ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA, Plaintiff,	)	
vs.	)	No. CR 2008-1339
STEVEN CARROLL DEMOCKER, Defendant.	)	

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, MARCH 2, 2010
9:07 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

MARCH 2, 2010
9:07 A.M.

PRETRIAL MOTIONS

APPEARANCES:
FOR THE STATE: MR. JOE BUTNER AND MR. JEFF PAPOURE.
FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY HAMMOND AND MS. ANNE CHAPMAN.

THE COURT: This is State versus Steven Carroll DeMocker. Mr. DeMocker is present in custody. Mr. Hammond, Ms. Chapman, Mr. Sears are present for the defense. Mr. Papoure and Mr. Butner are present for the State.

Mr. Sears.

MR. SEARS: Judge, we have a great deal of ground to cover today, and I wanted to take just a moment at the outset to advise you of some issues that have arisen and, frankly, from our perspective, they've really reached critical mass today, and it is this:

As I am sure you are aware from the pleadings in this case, there is what we believe to be a very serious discovery dispute in this case involving what we think are late disclosed witnesses and experts and documents by the State in this case and our motions to exclude them and for sanctions in response and the State's responses to that and the problem that that creates.

And at the same time, I need to speak with you today, hopefully, about scheduling the jury selection process. Over the last week, since we were here on February 19th, our jury consultant, Mr. Guastaferro, who you met, has encountered his own really serious scheduling problem. He is retained in a capital case in Tucson and had been operating on the assumption that that case was going to be continued, and his work in that case would not overlap or interfere with his work for us in this case.

Well, I think we all know what happens when you bet on a continuance. And yesterday, the presiding judge in that case denied the defense motion to continue the trial. I will talk in more detail about this when the time arises, but, as a result, we are going to ask you to make some changes in the scheduling of events in the time line that we've presented to you for jury selection so that Mr. Guastaferro can, first, work with us, and then scramble and be ready to assist the defense in the Pima County case that he's got scheduled. That case starts trial, now, the week of April 12, and I have some ideas about what we might be able to do.

But this is what's happened, Your Honor. As a result of this convergence of issues, the need to get the jury selection process pinned down and under way, and the understanding that we have that once we begin that process,

it would be extremely difficult to put the brakes on.

And this: We have said to you repeatedly, that so long as Steve DeMocker remains in jail and an innocent man in this case, we would do everything in our power to be ready to go to trial on May 4th, and that is still our intention. We have -- if the matters resolved, that could be resolved regarding disclosure of witnesses and experts and documents can be resolved, that is our intention.

The jury selection process that we are going to describe, with some modifications, would keep us on track for that. But I just wanted to alert the Court to this idea that things have to happen, from our point of view, pretty quickly and pretty clearly and pretty convincingly so that all of us understand where we are in this case. And I brought my calendar in the hope that if we run out of time today, we can find the next available minute that you have to continue this discussion about these issues.

This is an escalating situation, and the juxtaposition of the problems that Mr. Guastaferro have only made it clear to us that we need to get these issues resolved. So with that, we still have much to do today, and our intention was to proceed with the omnibus death penalty motion. Mr. Hammond is prepared to argue that when you are ready to hear that.

THE COURT: Thank you.

Any particular pressing issues from the State's perspective, Mr. Butner?

MR. BUTNER: I don't believe so, Judge. Thank you.

THE COURT: Mr. Hammond?

MR. HAMMOND: Thank you, Your Honor.

Your Honor, we have briefed, now, and are prepared to argue to you this morning what we have referred to over the last many months as the "omnibus death penalty motion." It is the motion in which we have tried to collect in one place the issues that we think raise the most serious questions about the constitutionality of the death penalty, both nationally and in Arizona. As the Court will well recall, we decided a couple of months ago that it was best to address separately the capital jury project and its findings, because of our focus at that time on the State of the jury's involvement. And so we have separated that out and have taken the rest of the issues that were of concern to us and have put them in the motion that the Court has now received, and I believe the Court received, yesterday, a response from the State of Arizona.

What I would like to do in a few minutes this morning -- obviously, I have no intention or the time to repeat everything in that motion. So what I have elected to try to do is to address a couple of the things that, to us,

are the most important topics and the topics that we think, in light of the State's response, deserve a few minutes of the Court's time today.

Any examination of the constitutionality of the death penalty, both nationally and in Arizona, really has to begin in 1972 when the United States Supreme Court decided five to four, Furman v. Georgia, holding the death penalty, as administered in the United States, unconstitutional at that time, but leaving the door open for states to try it again. And in the years after 1972, most states, 35 of them, did try again. And over the next couple of years, several other states tried. And I think at one point, we were up to maybe 39 states that had at least attempted to experiment with reinstituting a death penalty.

And when every one of those laws was introduced, it wound up being the subject of litigation in the state in which it came -- from which it came, and many times in the Arizona Supreme Court here and courts nationally and, of course, in the United States Supreme Court. And throughout the early years of that effort, members of the court, particularly the justices who were then known as the swing justices on Furman, Justices Blackman and Powell continued to believe that a system might be developed, that the mind of man could contemplate the possibility that we could actually have a death penalty that could be applied in

a way that was constitutional, in a way that was not arbitrary, and in a way that helped us distinguish the worst of the worst from the norm of all homicides.

The Court was very clear from Furman and from Greg and cases after that, that it is unacceptable as a constitutional principle in the United States to have a mandatory death penalty. It is also unacceptable to have a death penalty that can be applied arbitrarily at the whim of any prosecuting agency. So the search from 1972 till now has been focused on the question "Can it be done?"

And as the Court knows, Justice Blackman, 15 years after Furman, decided that it could not be done. And he wrote his famous opinion in which he said he no longer would tinker with the machinery of death.

Louis Powell came to that conclusion several years later in the course of interviews for what became his official biography written by the gentleman who became dean of the University of Virginia School of Law, John Jeffries, who asked Louis Powell if he had any regrets from his 16 years on the Supreme Court of the United States. And he said yes, he regretted his decisions in the death penalty cases, because he had come to believe that the death penalty was unconstitutional.

Well, for those two justices, a conclusion was reached, but we all know that for the majority

of the Supreme Court and, therefore, for courts elsewhere in the country, the search for a system that works has continued. And I want to come back and talk about that search for the worst of the worst and for a system that might be described as something other than arbitrary.

But there was another facet of the Furman opinion that I think we should address, first. One thing all nine justices on the United States Supreme Court agreed upon in 1972 was that the Eighth Amendment, the cruel and unusual punishment clause, had to be read in the light of evolving standards of a maturing society. The Court, both majority and dissenters, in the nine opinions in that case, in one way or another found value in a 1958 Supreme Court opinion, Trop v. Dulles, that dealt with taking away a person's citizenship.

And the language that became the key to interpreting the Eighth Amendment became the language that I've placed up here on the PowerPoint. "The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

I thought it best to put this quote up again and to remind us all that this was and remains the unanimous view of the Supreme Court, because the State in its response seems to suggest that all of these questions about the constitutionality of the death penalty are over, that

they were decided in Greg, that the Court need not look at whether there have been changes on the earth and in America since 1972. I doubt that the authors of the State's response really think that the law is that the death penalty has now been immutably determined to be constitutional, because it clearly has not. And courts are required to look at the question whether changes have occurred since 1972 or 1974, in the case of the Greg decision, do call into question whether society is evolving in a way that calls into question the constitutionality of the death penalty.

We have pointed out several things that we think are relevant to looking today at the death penalty, both nationally and in Arizona. One of them, and these statistics are produced every year, is that the total number of executions are declining. We have gone down every year for at least the last 12 years.

As the Court knows, there was a modest technical uptick in 2009 that is the result of there being a moratorium on all executions for a period of time while we addressed the question of the constitutionality of lethal injection -- one method of State execution. But the trend has been undeniably downward. The death penalty is becoming less and less used. There are fewer and fewer cases brought around the country -- not necessarily in Arizona, but the numbers of executions have consistently gone down.

The polling nationally has gone in a direction that is consistent with the drop in executions. And as we've pointed out in our papers, when asked about the alternatives between death and life without possibility of parole, we now have more people saying that they prefer life without possibility of parole to death than we have ever had before. And I put up here the most recent Gallup poll numbers, which show that a -- it's almost equally divided now, but slightly more, and maybe not statistically significantly more -- but certainly as many people believe that we would be better off with a system that had real life without possibility of parole than we would with a death penalty system. Those numbers have continued to go up, as we pointed out in our papers, but we think they typify changes in our culture in this country.

Deterrence is one the issues that seems always to arise. The State suggests to you that deterrence is in some way irrelevant, but we suggest that it is not. And a look at the opinions in Furman, I think, confirms that.

Those that think that the death penalty was constitutional, including Powell and Blackman, felt that it was acceptable, because the legislature could reasonably conclude that the death penalty does have a material deterrent effect. This particular recent study, that we have included in our papers and that I have included in this

slide, is, to us, a pretty overwhelming consensus.

Criminologists who have been polled around the United States overwhelmingly agree that the death penalty does not deter homicides. The common-sense logic for that, I think all of us have come to understand. But we have a wonderful crucible, now, in this country, because we have so many states that do not have the death penalty -- 15 that do not, 35 that do. We have neighbors on both sides of us who don't have the death penalty.

And one can easily look at many criminologists at whether homicide rates fluctuate with respect to those states that have a death penalty and those states that don't, or those countries that do and those that don't. And the answer, again, virtually universally is that there is no significant evidence that the death penalty deters. And one has to ask, if there is no evidence that the death penalty deters, why would an evolving standard of decency still think that the death penalty ought to be employed.

There has been, in the last couple of years -- and I am only going to cite here quickly the things that have happened most recently. But as we have mentioned to the Court before, last year, the state of New Mexico became the 15th state to now have abandoned the death penalty. Last year alone, legislatures in 11 states

considered proposals to repeal the death penalty. The Connecticut legislature voted to abolish the death penalty -- both houses in that state, but that law was vetoed by the governor. Legislation abolishing the death penalty passed in one house in our neighboring state of Colorado and in Montana and, as the Court may have read last summer, came very close to passing in Maryland, after a commission was formed to look at the state of the death penalty both nationally and in the state of Maryland. So there are things going on nationally, and of course there are things going on very close to us, in places like Colorado and New Mexico.

The Court concluded, a long time ago, that in determining the evolving standards of our society, we have to look at the international community, as well. The international story, I think, has been told so well so many times that we need not spend a lot of time on it this morning, but it is important, I think, whenever we talk about this topic, to observe that 95 percent of all executions were carried out in six countries -- China, Iran, Saudi Arabia, Pakistan, Iraq, and the United States.

We think it is also important to observe that Europe and Central Asia are now virtually death-penalty-free zones. You cannot become a member of the European Union if you are still a state -- a country that has the death penalty. In the last few years, I have had the

opportunity to participate in cases in both Croatia and Turkey and have observed how the standards in those countries are changing for exactly this reason. They can't get into the European Union unless they come to their senses and do away with the death penalty. And do away the death penalty they are.

We are unlikely ever to see another state approved execution in either Croatia or Turkey or anyplace else in the European Union. There will be days, and there will be a lot of them, where the only person at the international table, the only party at the international table that still embraces the death penalty will be the United States. And when one looks at the North American and South American and Central American continent, we see the same thing. It is not just our brothers to the east and the west, it is essentially the whole world, with the exception of that small tawdry list of countries in the first part of the slide.

You can't find a country that consistently tries to carry out the death penalty other than the United States. You can go north -- nothing north. Canada has long sense stopped this. You can't go to Central America.

You can't go south. There are a very few states in Central and South America that still, on their face

have the death penalty, but they don't use it. We turn out to be the only ones. And courts will recognize this. Whether they recognize it today, whether this Court is prepared to recognize it, the day will come when this overwhelming weight of the international community will become unavoidable.

I have done a slide, here, about an event that occurred just last week in Geneva, Switzerland. There was the Fourth Annual Congress against the death penalty, and there were representatives of nations from all over the world. The keynote speaker was Bianca Jagger, who has quite a pedigree of her own, in terms of the work that she has done -- not just on the death penalty, but on so many other issues of public importance.

But it seemed to us relevant to recognize that within a week of the time that we are here arguing this question, people like Bianca Jagger and others are saying the things that we see here. Those who are executed are rarely those who have committed the worst crimes. The death penalty is a Russian roulette. And I will show you, in a few moments, how that is true in our State of Arizona.

"The system of jurisprudence based on arbitrariness and whim cannot be deemed a justice system. The application of the death penalty is erratic, unwarranted, and disfunctional. The U.S. cannot continue to execute its

citizens under such loose bundling mechanisms." And, of course, that is someone speaking in Geneva.

But here is the voice of the conservative leadership of the bar in the United States. The American Law Institute, which is, I think, widely recognized as the citadel for lawyers from established law firms around the country that have worked, now, for decades to establish a system for imposing the death penalty, that that would be rational. They started this particular effort after Furman, and they kept at it, God bless them, for over three decades. But in 2009, they finally gave up.

The American Law Institute, which has a Model Penal Code, which is often cited, and often cited in death penalty cases, has now removed from the penal code its death penalty provisions. Why? Because they can't write them. There is no honest way for a group -- even a group of lawyers who consider themselves the conservative bastion of America, to write a system that will work. And so they withdrew famous Section 210.6 of the Model Penal Code, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering the death penalty.

Your Honor, I would suggest too that when we have, in the same year, the American Law Institute and countries around the world all coming to the same conclusion,

it is at least important to look to see whether it is conceivable that Arizona may be having an experience different than the experience of the rest of the world. And we know, I think, from even the most cursory examination, that that is unlikely to be the case.

And last Sunday, I looked at the New York Times, and I found yet another article that, to me, sort of amazingly summarized in one paragraph the current state of matters with respect to the death penalty in America. It is only a few words, but I think it is important to read it, particularly at this time, since we are arguing this issue within less than two weeks of the publication of an article signed by Dahlia Lithwick.

"Statistics from the Death Penalty Information Center show that the death penalty in America is dying. In 2009, the number of death sentences dropped for the seventh consecutive year. It's now the lowest since the Supreme Court reinstituted the death penalty in 1976. Eleven states have considered abolishing the death penalty last year, citing high costs and lack of measurable benefit. New Mexico became the 15th state to abolish it. A recent study at Duke University concluded that North Carolina could save almost 11 million dollars annually by doing away with capital punishment. And the prestigious American Law Institute, which devised the framework for the modern system of capital

punishment, recently abandoned the whole project."

Your Honor, this was written months after we did the drafting of our motion. What we have put together in the motion is not unique. It is not contrived. It is what has become the consensus of people who look at this question around the country and around the world.

So in addition to looking at that question, we also, then, turned to looking at the question I raised earlier, whether the Arizona death penalty is in some way different, whether there really has been, in this state, some combination of judicial and legislative efforts that have allowed us to find the worst of the worst and to make those eligible for the death penalty while others are not.

As I think the Court is aware, a lot of what has happened in Arizona probably has to start with Ring v. Arizona, the case that held that the Arizona Constitution -- the Arizona death penalty system was unconstitutional because of its lack of consideration of the role of the jury under the Sixth Amendment. So a number of things happened. The first one is that the attorney general, when Janet Napolitano was in that job, established a capital case commission to look at the state of the death penalty in Arizona -- just in one state.

There are a number of findings and recommendations in that 2002 report, but a couple of them

seemed to us particularly pertinent to what we are dealing with today. One, in the selection of capital cases, the report urges prosecutors to develop written policies regarding identification of cases in which to seek the death penalty, including a provision to solicit or accept defense input before seeking the death penalty. That recommendation, as I said, was made eight years ago. Eight years have passed.

The County of Yavapai had people involved in that study and, as the Court I'm sure is aware, Yavapai County, for whatever reason, has no such policies. It has no system to solicit or accept defense input. And I will come back to that in just a moment.

And then there is the most ubiquitous of the aggravators, the F-6 aggravator for especially cruel, heinous, or depraved conduct. The commission, at that time, recommended that that particular aggravator be subjected to further study and that the members of the commission -- and many of these people were judges and legislators -- believed that this aggravator was overused and was unduly vague. And as far as I know, and I believe that we have tried to follow this pretty closely, no one has yet been able to even seriously consider undertaking a study of whether the F-6 aggravator has been misused, except for us, and I will talk about that in just a moment.

But one other recommendation of that commission is worth noting. The commission recommended that there be cooperation in the future in capital case data collection -- that we ought to be keeping track of what cases are charged on what bases, all across the State of Arizona, so that we can begin, at least, to examine the question in an honest way whether, in fact, we have a system that is arbitrary or a system that genuinely narrows to the worst of the worst.

Four years later, the American Bar Association commissioned a study -- it published a study. It was actually done over the year or so prior to 2006. But that committee wrote a 300-page report looking at the questions of the fairness and accuracy of the death penalty system in Arizona and in several other states, but this 300-page report dealt only with the State of Arizona.

I served on that committee, along with people from the Attorney General's Office, with the former United States Attorney in Arizona, former justice of the Arizona Supreme Court, the Director of Urban Inquiry at ASU. And that group made a number of recommendations.

And again, one of them was that every county ought to have standards. They ought to have some sort of written policy to ensure the fair, efficient, and effective enforcement of the criminal law generally and the

death penalty, in particular. To encourage transparency, so that people who live in this state could have some idea of whether we do have a rational system or not.

They also recommended that there be input from the accused before a local government, a county, decides it is going to seek the death penalty, the same recommendation made by the attorney general four years earlier. Well, as the Court now knows, nothing has been done as a result of either of those reports or as a result of anything else that has been tried in this state. And so a few months ago, we decided to at least try to do our own review of statistics, at least in this county and a couple others.

And we were fortunate enough to find a young law school graduate who was willing to spend the time in the clerks's offices in several counties over the last few months looking at the raw data with respect to the application of the death penalty in this state, and she was kind enough to come up here this morning. She took the bar exam last week and has been incommunicado for some reason I find intolerable. But Kindra Helferich is here with us today. I invited her to come up so that she could see her work product and also help us, if anyone cares enough about this topic to actually ask a question. She and one of our other young lawyers, Christina Rubalcava, who is also here

today, have helped us make sure that the data that we have looked at is as accurate as we can make it under some pretty difficult circumstances.

But what Kindra did is what nobody else has done. She went to the clerk's office here in Yavapai County, and she looked at every single homicide charged in this county between Ring and today. She did the same thing in Coconino County -- through -- I say today -- through the time that we had to cut of this study, which was the middle of last year, 2009, in Maricopa County, because there were over 1600 homicides.

We randomly selected a group of 10 percent, with the help, frankly, again, of ASU's people, who donated their time -- Peg Bortner and others to make sure that we were doing our study in a way that was statistically appropriate. But we chose to look at 10 percent of those cases, and our conclusion as detailed in the brief, is simply this: The results of our research clearly demonstrate that the death penalty is not strictly applied, that no one could really make the argument that we have a system in these three counties or anywhere else in the State of Arizona that even begins to ensure that the death penalty is reserved for the worst of the worst.

Very briefly, Your Honor -- and I've got all of the statistics in the brief itself and in some other

documents that we are happy to share with the State, if they would like to look at them -- in the years in question, Coconino County charged 25 homicides. Of those cases, four of them -- I'm sorry -- 20 of them were charged as first degree murder. And of those, only four were charged as death penalty cases. If you were doing this as a percentage matter, that would wind up being 20 percent of all of the first degree murders.

Maricopa County, as I said, had over 1600 homicides, but we looked at one-tenth of those that had been charged as first degree murders, and we found that overall, about 36 percent were charged as capital cases. And if you look year to year, it is even more inexplicable. There are some years where there are very much smaller percentages than 36 percent, and there are a couple of years where it winds up being nearly half of all homicides in Maricopa County charged as capital cases. One year, I think as we pointed out in our papers, it was 46 percent of all first degree murder charges.

Yavapai County over these years, had 80 total homicides that were charged as capital cases. By the way, I have no idea why there are so many more charged here than there are in Coconino County, next door. Population differences don't account for that significant difference. This is more than three times as many homicides charged. We could find no other reason for it.

Maybe some would say that Yavapai County is a place that -- where a lot more killing goes on, but I would suggest that that probably is not the case. But the numbers, we thought, were pretty significant, that out of those charged as first degree murder cases, ten were charged as death penalty cases -- or about a third.

What we found in trying to look at all of these numbers -- and we looked at them in lots of different ways, and I am not going to take more time this morning to go through all of the different ways that we tried to examine the data -- but what we found is that the death penalty is only sought in some cases where aggravators are alleged, that the factual circumstances in the cases where death is not sought are really not significantly different from the facts of this case. We could do a whole alignment of cases, and we have talked about some of them in our papers, where there are just no ways that we can say why one is a capital case and the other is not.

But one of the things we found along the way that we thought was particularly interesting, and something I haven't seen reported by others, is that the same aggravators that are found in the death penalty statute are also found, as the Court is well aware, in non-death-penalty cases. Aggravators can and are often alleged in first degree murder cases that are not capital cases. And so we said,

well, let's take a look at those, at least in a couple of counties where we could actually find the data. Unfortunately, we couldn't find it easily in Coconino County. But in Maricopa County and in Yavapai, we found this odd and, I think, inexplicable situation in which in a very large number of cases, even in the sample that we did, the first degree murder cases that are not charged as capital cases nonetheless use the same aggravators -- most particularly, the aggravators we have here -- especially cruel, heinous, or depraved, pecuniary gain, or the F-2 aggravator, for a crime committed in the course of committing another burglary or another crime.

So the question that this poses that we think has no answer -- no rational answer -- is why is it that in either Yavapai or Maricopa County some cases where the aggravators -- the very aggravators in this case are alleged are not charged as capital and sometimes they are. A person might have thought, but for this information, that the cases that aren't charged as capital aren't charged because the aggravators aren't there.

But we are finding over and over again that the prosecutors think the aggravators are there, at least sufficiently to allege them as part of the -- that the initiation of the prosecution, but they are, in many cases, not charged as capital. And we suggested that the conclusion

that one has to draw from this is that there really is no way to say that the death penalty as charged in Arizona is at all rational.

I am not going to spend time looking, again, as we did in the papers, at some of the specific cases that we found both here and in Maricopa County, where people have been charged with crimes that some would think are -- if you were trying to do sort of a heinous review -- would be more heinous than the one here. But it doesn't matter. I mean, if you look at these cases, they are all over the lot.

And I defy the State to stand up here now, or at any other time, and try to defend the rationality of this system. They may be able to find a way to deal with a specific case, but they can't find a way to defend the system. And that then leads us back to what are the aggravators here, and are the aggravators here charged in some way that would make this a case in which the death penalty ought to have been charged.

First of all, F-2. As we said in our papers, this particular aggravator, interpreted the way it is interpreted in Arizona, makes us the only state in America that takes what is essentially part of the same charge, part of the same event -- entering a home, entering private property, and committing a homicide -- we are the only state in America that makes this a death penalty eligible event in

and of itself. The State would have us believe, well, if a person enters a home and commits a homicide, they deserve what they get. Well, that is really not a very helpful answer when you are trying to decide whether there is a system that rationally narrows or rationally decides which cases should be death and which cases shouldn't.

We've talked about F-5, about pecuniary gain. If it were applied as broadly as the State would have it here, there wouldn't be the few cases in which pecuniary gain would not be part of what the State can allege. You can almost always find, in these cases, some financial motive, some betterment that someone could conceivably have hoped to achieve, even if there is no evidence that it motivated the particular crime.

And F-6 -- and we keep coming back to this especially cruel, heinous, or depraved point. And we have argued, I think, extensively that you simply can't find a way to say which cases are especially cruel, heinous, or depraved and which ones are not. Well, the State in its response has told us we need not worry about that anymore, because they all are.

At Pages 6 and 7 of their response, the State says, quote, "Only where there is no" -- and they underline the word "no" -- "no evidence that the victim suffered physical or mental pain or the evidence is

inconclusive have Arizona courts held that cruelty was not shown."

Well, that's fine, if that is what the State wants to claim. If the State wants to claim that anytime a person can be found to have suffered or any case in which there is some evidence -- apparently, even a slight bit of evidence -- that's enough, and that is okay, and we can then charge that crime as a death penalty crime without more.

And I would submit to you that this a confession. It's a confession by the State, confession by Yavapai County, that they know they have no rational system. They know they have no way to defend when they use cruel, heinous, and depraved and when they don't. So they say, well, if there is any evidence of suffering at all, every one of those cases can be charged as capital.

Your Honor, the total chaos in this system, I would submit to you and to the State, is evident. Maybe it might have been different had somebody bothered to consult with the defendant's counsel before they made a decision to seek the death penalty, as attorney general and then Governor Napolitano and her commission recommended or as the American Bar Association recommended, but of course, they didn't. And they are not required, as currently structured under the law of Arizona, to do any more, so they don't.

And so the factors that at trial we would

hope a jury would consider have not yet been considered in this case, and they may never be, for all we know.

We are not going to talk about the capital jury project today, but the burden of that series of studies, the interviews of over 1200 people, we think demonstrates pretty clearly that jurors are not capable of doing the kind of careful and refined sifting of aggravators and mitigators that the law contemplates. So if the County itself decides not to do it, if its prosecutors -- it's public prosecutors decide not to, it may well never happen, and it certainly may well never happen in this case.

When we think about how chaotic this system has become, I would ask you to consider what would happen if this crime had occurred a few miles north of Williamson Valley, if it had occurred across the border in Coconino County. We now know that the chances of it being charged as a death penalty case in that county are remarkably less than in this. Why is that so? Why would we have a system in which that simple event of geography would make as much difference as these numbers suggest.

What about homicides occurring -- and I have this vision, often, of the four corners, our great point of contact on the Navajo reservation between Utah, Colorado, New Mexico, and Arizona. If a homicide occurs in that locale, we all know now that it matters a great deal on which

side of the border that crime is charged.

If it's charged in Arizona, you have what we see this morning. If it is charged in New Mexico, it is not a death penalty case. If it's charged in Colorado, the chances of it being a death penalty case are minuscule. I think there are four people on death row in the Colorado, a state that is demographically not significantly different than the State of Arizona.

Utah is rapidly approaching the point at which it's not using its death penalty system either. And if the case were charged federally, we would at least be able to have an opportunity to meet with the attorney general of the United States. We would at least have an opportunity to go in and talk to somebody about this kind of information and about the aggravators and about mitigating evidence in this case. An opportunity that is denied to the defense, simply because this matter is charged in Arizona and charged as a state offense.

Your Honor, we think it is obvious that the death penalty across this country has reached a point at which it is no longer acceptable, that as a society we ought to acknowledge our failure. We ought to say that we can do better by not having a death penalty and that the Eighth Amendment commands that. And as I said earlier, it will happen. It may happen this year, it may happen next year,

but it should happen in this court, and it should happen now.

Whatever happens in terms of the overall view of the death penalty, we submit that in this state one has to acknowledge that we simply do not have a system that is rationally applied. And maybe it can't be. Maybe it is not fair for us to be so critical of the prosecutors in Yavapai County. Maybe nobody can do it. Maybe the aggravators are so loose and so multiple and so many now, that we simply can't do it. But there is no excuse for not trying. There is no excuse for having at least some system to attempt to rationally distinguish those who should live from those who should die.

And for all of these reasons, Your Honor, and I thank you for your patience this morning, we ask that the Court declare the death penalty unconstitutional on its face and as applied.

THE COURT: I have a question about the F-2 factor. State v. Kuhs -- K-U-H-S -- last week came down. Apparently, the F-2 factor was an element of the alleged aggravating factors, but I couldn't tell from reading the opinion myself -- and maybe you have insight because you are connected to the capital litigation folks in the state -- but it wasn't addressed by the Supreme Court. I am not sure it was addressed by the defense in their presentation to the Supreme Court.

MR. HAMMOND: I read the opinion, Your Honor, and I noticed exactly, I think, what you did, that the F-2 aggravator is mentioned. And one has to read maybe in a footnote where the observation is made by the Court that counsel in that case did not challenge almost any of the sentencing issues. I think the only issue raised -- and I am very sad to say this -- but the only issue raised by the court-appointed lawyer in that case dealt with one aggravator and not with F-2, and I do not know why they didn't do it and why the Court didn't separately examine it.

THE COURT: They didn't seem to mention anything about that. And I, frankly for one, have been more concerned about that particular aggravator than probably the other two, not discounting your arguments, but that one has been more troubling to me on a philosophical, legal level than the others, simply because it is so new, there is such a lack of litigation. And with the opportunity to discuss it last week, the Supreme Court didn't.

MR. HAMMOND: When that case came down, one of our young lawyers, who has an office two doors from mine, came in and handed me the opinion and said that he and some of his colleagues had been playing a game trying to figure out what homicide could not be charged as a death penalty case if you had F-2, F-5, and F-6 all in the same case. And they came to the conclusion that there are almost no

homicides worth talking about that couldn't be charged. And he observed, I think, the same thing that the Court did, that it is a head-scratcher, that the Supreme Court on its own seemed not to have addressed the issue.

THE COURT: Thank you.

MR. HAMMOND: Thank you.

THE COURT: Mr. Butner.

MR. BUTNER: Thank you, Your Honor.

We have addressed the arguments of counsel in our memorandum, but I think that some of them, especially as argued this morning, deserve more attention.

Counsel argues that the Eighth Amendment, in dealing with a maturing society, contemplates an evolving standard of decency and talks about executions declining, being less used; more sentences of life without the possibility of parole; the fact that the death penalty doesn't deter homicides, at least according to the statistical analysis; and some of our neighboring states have abolished the death penalty and the international community is abolishing the death penalty.

I would suggest that the United States and Arizona have refused to surrender to an international trend that tends to absolve citizens and absolve offenders of individual responsibility. One of the hallmarks of Arizona, from the date of its inception as a state, has been that

individuals are responsible for their own actions and, as a result, should suffer the consequences if they commit an offense.

Our maturing society has continued to recognize that some murders are especially egregious. That is, they are the worst of the worst and deserve imposition of the death penalty. And our Supreme Court has continued to hold the death penalty to be constitutional.

Counsel cites the New York Times, that bastion of jurisprudence, indicating that the New York Times says that high cost and lack of measurable benefit are the reasons that the death penalty should no longer be imposed. That is not some highly principled reason to do away with the death penalty.

I would submit to the Court that it takes courage, it takes integrity, it takes a willingness to be your brother's keeper and your brother's protector. Arizona and particularly Yavapai County have assumed that responsibility. They have shouldered that load.

The defense bar has asked successfully that the jury be given the responsibility of considering the evidence as to whether the death penalty should be imposed in certain cases, and the State and Yavapai County certainly are in agreement with that. Juries have a community sense of what is especially cruel and depraved or heinous.

It is an extremely presumptuous argument, in this case, that the defense in this case or the defense in general shall be the judge of whether the facts in this case differ or are similar to the facts in other Yavapai County homicides that have not been charged as death penalty cases. For them to suggest that the death penalty is not rational ignores what our legislature and what Yavapai County officials have shouldered as a responsibility.

An elected Yavapai County attorney is entrusted with the obligation of whether to charge the death penalty, is entrusted with that responsibility. And they are entrusted to do that on behalf of the citizens of Yavapai County in accordance with the law as set forth by the Arizona legislature.

The defense suggests that the death penalty in Arizona and, more particularly, in Yavapai County is total chaos. What we have here is the defense acting as the instruments of chaos. The fact of the matter and the law of the matter is that we trust our elected officials, and more importantly, we trust our citizens, our jurors to be capable -- not incapable, as suggested by the defense -- but capable of weighing aggravation evidence and weighing mitigation, which need not even rise to the level of evidence, to determine whether a particular homicide deserves imposition of the death penalty.

I would suggest that repeatedly Arizona courts have found the death penalty to be constitutional, even as recently as last week, in State v. Kuhs. And although maybe the F-2 factor was not specifically mentioned by the Court, it certainly was sustained as not being fundamental error. And I would suggest that this Court should continue to adhere to what is the law in the State of Arizona and that is that the death penalty is constitutional. Thank you.

THE COURT: Thank you.

Mr. Hammond.

MR. HAMMOND: Thank you, Your Honor.

I invite the State to give some thought to the suggestion that a jury will in some way be able to resolve the chaos and the arbitrariness which we find in this system, that a jury reflecting the, quote, "community sense," close quote, will be able to decide whether this homicide, as opposed to other homicides, meets the definition of, quote, "especially cruel, heinous, or depraved," close quote.

I would ask the State and I would ask this Court, how on earth is a jury to be able to do that? The statisticians talk about normalizing, about determining whether something is or is not in the norm. Well, you can't do that in any field if you don't know anything about the other cases. Everything that the jurors in this case will

know about other cases is information that they will have gotten largely from television, and that is why we attached the complete article that Professor Haney has recently written about the myth of jury ability to set aside all of the things that they know and have heard about crime in America.

The truth is that this aggravator, more than any other, invites jurors to completely speculate, based upon God knows what has happened in their lives, things that they have seen on television or read, or things that they experienced, that make them think that a particular homicide is especially bad. And we submit to you, in a case in which innocence -- and I haven't talked about innocence this morning, but the Court knows how we feel about the importance of innocence as a factor here -- but in a case in which innocence is the defense -- that is, the defendant has said he did not commit this crime -- how is it that we are able to help the jury understand that this homicide is not especially cruel, heinous, or depraved? How are we going to do that as lawyers and as a defendant at the same time that we acknowledge, as we believe, that Carol Kennedy suffered a terrible death? It simply can't be done.

And if, in what we hope is an unlikely event, this case goes to trial as a death penalty case, and if Mr. DeMocker is found guilty, we suggest that it will not

take this jury very long to decide whatever we say that the F-6 aggravator -- cruel, heinous, or depraved -- applies. They will have little else to go on. We will try. We always try.

But the truth is, this isn't a matter of trusting or distrusting judges, or trusting or distrusting jurors. This is a systemic problem, and it is built into this system, and it simply can't be blamed. It is there. It will be there unless somebody says we have to go through some process to figure out what it means to have a crime that is especially cruel, heinous, or depraved, and nobody has done that here. Thank you.

THE COURT: Thank you.

I am going to take a recess, about ten minutes, for my staff.

(Brief recess.)

THE COURT: All of the previously mentioned lawyers are present, as well as the defendant.

I am not without concern for the issues raised by the defense concerning the constitutionality of the death penalty. Recognize that my court is a trial level court, and I am bound by the precedence established by the appellate level courts.

I found the statistical information quite interesting. I may be familiar with most, if not all of the

Yavapai County cases. I can't say I am likely to be familiar with all of the Maricopa County and Coconino County cases. I recognize that the executive branch in each county is represented by a different agency and the different final decision maker, as far as the County Attorney's Offices are concerned.

I appreciate the efforts with which, Mr. Hammond, your volunteers and staff have gone to trying to flush out some of the differences between the various counties or problems common between the various counties. And, as can you tell, I was and remain concerned about the F-2 aggravator and didn't feel a bit enlightened by the Kuhs decision last week. It may well be, as Mr. Butner suggests, that there was some review by the Supreme Court of that particular factor and a determination by the Supreme Court that there isn't legal issue with regard to application of F-2 as one of the proper factors.

But because they don't mention it, because they don't elaborate on it in the decision, it is hard for a trial judge to really determine what to take out of that, other than perhaps that it wasn't raised and wasn't addressed by the defense, wasn't addressed by the State, and so wasn't addressed by the Supreme Court. So I think that remains a potential issue. Obviously, your team has raised it. I've expressed my concern about it.

But at this point, the legislature has established F-2 as a potential factor. And at this point, I am going to find that the death penalty is constitutional as relates to this case and as systemically applied in Arizona and based on the information in the precedence that I have to rely on. That's as far as the legalities of the constitutionality of the death penalty are concerned.

I still have under advisement the sanctions that includes the issue of the request by the defense, addressed by Ms. Chapman, to strike the death penalty in this particular case as a sanction under Rule 15.7, as well as the case law. I think, since we last met on the 19th of February, I received an additional pleading from the defense on February 22nd, a supplemental memorandum.

So at this point, for the record, I am denying the request by the defense to declare the death penalty unconstitutional as applied in Arizona, as applied in Yavapai County, and as applied specifically to Mr. DeMocker's case, since it has been noticed by the Yavapai County Attorney's Office for this case.

But the issue of striking the death penalty as a sanction, as I say, is still under advisement. I guess I would like to be updated, since I haven't ruled on that issue, yet, concerning the issues that Ms. Chapman or Mr. Sears or Mr. Hammond raised concerning the state of the

disclosure and discovery process.

Ms. Chapman or Mr. Sears.

MR. SEARS: Your Honor, before we do this, there are a series of motions, and we've summarized them in a reply that we filed at the end of the day yesterday, in support of our motion for sanctions, including the sanction of dismissing the death penalty. On Page 2, in Footnote 1, we've listed, I think, the motions that are pending --

MR. BUTNER: Excuse me, Mr. Sears. Excuse me for interrupting, Mr. Sears, but I don't have that reply.

MR. SEARS: Well, it was filed yesterday and a copy was put in the courthouse basket. I will give you another copy in a moment here. Let me see if I can get Mr. King a copy. We will give you an extra copy that we have.

But this relates to the remarks I made at the beginning of this morning's session about this situation involving late disclosure of witnesses and evidence in this case.

And other than the State's motion that was filed several weeks ago seeking to preclude character evidence of Mr. Knapp under Rule 608, the remainder of the motions that we think are still out there, many of them were just filed in the last few days as a result of on-going disclosure and interviews in this case. But we think it is

very important, Your Honor, to get all of these resolved and argued as quickly as possible.

If we played out the normal and full briefing schedule, I am afraid that those motions would not be heard and decided until we were even closer to trial than we are now, and we're barely just two months out from the start of trial in this case. And as I said, these motions and the issues that are raised in these motions relate directly to our ability to be prepared for trial, how we go forward over the last two months of this case prior to trial, and, unfortunately, how the scheduling of the jury selection process is handled.

So, as I said, I brought my calendar. I would hope that we could set a date in the very near future to hear these motions. To the extent we don't hear them today, we're prepared to go forward -- Ms. Chapman is prepared to talk about any and all of these at the Court's pleasure.

But I wanted to take just a moment to advise the Court of how many of these motions that are now pending, and how many different topics are encompassed in these motions, and how, unfortunately, a number of these motions overlap because events on the ground were moving more quickly than the motions could be filed sometimes. We were filing motions within hours of some event where some

situation became known to us for the first time and we tried to react as quickly as we could to get those matters before the Court. So I think that is important.

And if I could just take a moment now, Your Honor, and talk about the jury selection issue that has come up and make a proposal to the Court now about some of these things, because I think they are really time sensitive, also, and they are unfortunately now directly related to these others issues, but here is what I would like to say. We had suggested, again last Friday on the 19th, that it was important for us to get a final version of the jury questionnaire from you, Your Honor, and we made some arguments on the record and you said that there were a couple of matters, particularly the question of whether you would put back into a questionnaire any argument about the race of the prospective juror.

Mr. Guastaferro has a great need to have the questionnaire finalized and made available to him, because what he will then do is build a database, based on modeling that he has done in the cases throughout the country, that will be the centerpiece of the work that we will do to receive these questionnaires, evaluate them, analyze them, and then begin to use the information in the questionnaires, first in our discussions with the State, and then ultimately in a meeting with you about the possibility

of striking jurors from questionnaire responses, and then to structure the voir dire during the actual in-person in-court jury selection process. And the longer we go without such a questionnaire, the more time pressure that process becomes. It involves having people, in addition to Mr. Guastaferro, involved in the assembly of the data, et cetera, et cetera.

The other thing is the actual time of the process. We have said for some time now that we thought it was appropriate to have a week in which the jurors would come in, in groups of 50 in the morning and 50 in the afternoon, over four days, here and in the Verde, to fill out questionnaires. And we had talked about targeting the week of April 5, Monday, Tuesday, Thursday, Friday, for that process. And we were moving full speed ahead until this Pima County case jumped in front of us.

And you had said to us that you had been holding some time on April 13th for the meeting with counsel to talk about where we were after the questionnaire reviews and whether there were strikes that could be made for hardship, for prejudicial knowledge of the case through pretrial publicity or answers to the death penalty questions. That just isn't going to work, because the Pima County schedule, unfortunately for Mr. Guastaferro, is that they are going to do all of the questionnaires on one day, and they're going to have all of the people come in on one day and answer

the questionnaires, and then the Court has scheduled the kind of a meeting that we are talking about taking place on April 13th.

The Court has scheduled that for April 8th in Pima County. So Mr. Guastaferro has to be down there, essentially, the week of the 5th of April and available. And then the trial actually starts -- the in-court voir dire starts -- I am not sure whether it is Monday the 12th of April or Tuesday the 13th, but certainly that week. So Mr. Guastaferro is going to be fully absorbed in this foreshortened process in Pima County the week of the 5th and the week of the 12th.

So one of the things that we talked about, and I floated this to Mr. Butner with a great deal of positive feedback from him, would be take our process -- leave that date of the 13th in place, on the assumption that it is going to be awfully hard for you to find another date to replace that, and hopefully you still have that time available -- but move the jury questionnaire completion process up one week, to the week of March 29th. So it would be the 29th, 30th, 1st, and 2nd of April, leaving Wednesday open, leaving the jury assembly rooms open here and in the Verde that Wednesday, on the chance that other judges would need to have juries come in for routine trials that week.

And then we could still use the 13th with

you, and it would give us a period of time after the 2nd of April to meet and confer with the State and also to get our arms around the data.

Mr. Guastaferro tells me he can come either on the 31st or the 1st to Prescott and work with us, most likely Thursday, Friday, Saturday, and Sunday before he would have to drive down to Pima County and begin working on Monday the 5th. And if we worked diligently during that period of time, including that Saturday and Sunday, we could probably complete the work on our end necessary do this.

We've also had a lot of internal discussion about how we could live up to our promise to you about handling the logistics of this process, and I think we are well down the road on that discussion. And I think what we can tell the Court today is that we can make arrangements to have the questionnaires picked up at the end of each session, both here and in the Verde, copied and scanned, burned to CDs or DVDs, to be made available as quickly as possible, hopefully, no later than overnight each day to the State, so that they can have the same data that we would have. It is going to be a chore, but we can undertake that. We can find a way to staff up to get that done. It would require bringing equipment up here that is probably not available in Prescott or Camp Verde to do the high speed scanning.

But we are looking at a maximum of -- if the questionnaire stays at about 18 pages, maybe 1800 pages a day that would have to be copied multiple times, and we could figure out exactly how many copies we would need, and then scan, using high-speed scanning equipment, and made available. And that way, by the end of the day on Friday or very early on Saturday of that week, we would have available to the State and to our use all of the data from all of the questionnaires. And also, obviously, the Court would have access to the same information, and the State can do with it as they please. I think that is probably the fastest and most reasonable able way to do that.

One other matter we had talked with you about, helping you write a script for this video presentation, Mr. Hammond has generously agreed to be the principal author of that, which will result, Your Honor, in you speaking very much like Larry Hammond on video. I will just leave it at that, if you think that's a good thing or not.

But we think a three or four-minute video that would also emphasize this new admonition that the criminal jury instruction committee has worked with. This new admonition that updates the do-no-research admonition to include the kind of research that people in the 21st Century would do using social networking sites would be very

important, because we can give the jury some information about this case and there is going to be some time.

There was an interesting letter to the editor in the Courier. I don't know what's possessed me over this case, but I now actually read the Courier, again. I had gone a very long time without doing that. But there was a letter I caught, in the last few days, from someone who had a very bad experience in a jury in -- it sounded like your old courtroom -- and wrote in -- did you read the letter?

THE COURT: I did.

MR. SEARS: And it just reminded us that one of the things that we had suggested this process of bringing people into small groups both for filling out the questionnaire and then for voir dire, as we move through the trial process, was to avoid this claustrophobic treating jurors like cattle and the things that that particular juror objected to and I think --

THE COURT: In Mr. Hammond's favorite courtroom.

MR. SEARS: I remember trying a case there, Your Honor, and saying, to no one in particular, "Welcome to basement court," and I got a cold, cold look from the people who work in basement court, and I never said that again.

So this is the problem. Our proposal is to simply take exactly what we were talking about, but move

the process of summoning the jurors to fill out the questionnaire up one week, to the week of the 29th and the 5th. And I think for a lot of reasons that are mostly our problem and not the Court's problem or the State's problem, we can make that work.

My concern is this, though: That because of this situation -- and I don't think that "situation" is a strong enough word. I don't want to overdo it and call it a crisis, but it really is a very, very large problem in this case regarding disclosure and what evidence will and will not be allowed and what witnesses may or may not be called for the State. Our concern is that we are moving very rapidly towards taking all of the steps, as if we were going to go to trial on May 4th, which I've said is our plan and our goal here, but we remain very concerned about how we were going to get there and how this is going to be done, depending on how the Court judges these particular issues.

So I am saying in one breath we want to do things quickly and we want to do things in the order and the sequence and on the dates that I suggested. And I am saying in the next breath, that what has happened over the last few weeks, in terms of disclosure from the State and the issues that we raised, concerns all of us on the defense side in this case. And I don't want to say it again, but we have to find a way to work through those problems.

So that is my suggestion, Your Honor, and this would -- when we are done with this discussion, Your Honor, Miss Chapman reminds me of a very important matter, which is you had said on the 19th that you would require the State to make proffers about the testimony of -- at that time it was 25. Now I think it might have crept up to 27 witnesses that we have suggested have nothing relevant or admissible to say in this case. And I believe the State told you on the 19th, as far as the transcript of that proceeding tells us, that they would be ready to do that.

So I think that's something that -- it's related to all of these discovery motions, and I think it's something we need to accomplish this morning. So I am done talking about the jury issues. I took a long time to say something very simple. We would just like to get the questionnaire approved as quickly as you possibly can and have a final version out so that we can begin to work with it as soon as you can, and we would like the questionnaire completion process to begin now on March 29th. Thank you.

THE COURT: Any input on those particular issues, Mr. Butner?

MR. BUTNER: Judge, I would like to hear the defense tell us what the new motions are. I want to make sure that I have gotten all of those motions.

MR. SEARS: Your Honor, it is on Page 2 of

this reply that we have given Mr. Butner. The footnote at the bottom of Page 2. I think that is a complete list of the unresolved discovery motions plus the motion that was filed on the 22nd, which is the largest of all the motions, which is the motion seeking to strike the death penalty as a sanction.

THE COURT: Here's what I think I have, Mr. Butner, that's helpful. I have a motion by you filed February 16th, a motion in limine to preclude character evidence of James Knapp. I received a reply from the defense -- a response from the defense on February 25th to that.

I have a February 24th dated defense -- filed defense supplemental motion to preclude testimony of Richard Echols.

I have a February 24th defense motion to preclude late disclosed UBS evidence.

I have a February 25th defense motion to preclude State's computer forensic experts and reports.

I have a February 25th defense motion in limine to exclude evidence offered in violation of 403 and 404(B).

I have a February 25th defense motion to preclude evidence of late Sorenson Labs forensic testing.

I have a February 26th defense motion to

preclude witnesses for attorneys fees and other sanctions, including dismissal of the death penalty.

I think those are the ones that I have listed. Whether we have gotten anything new beyond that, I don't know for certain.

As I mentioned, I also had the supplemental defense memorandum filed after we met on the 19th of February. The supplemental memorandum regarding motion to preclude late disclosed evidence and to dismiss the death penalty as a sanction.

Am I missing anything that still needs a go over and discuss?

MS. CHAPMAN: No, Your Honor. Those are the -- the original motion that was filed on February 5th, as I understand it, is still pending, and that is what was supplemented on the 22nd.

THE COURT: Right. And that is what I took under advisement. You supplemented it after I did.

MS. CHAPMAN: Correct.

MR. BUTNER: Judge, that means -- to my understanding, then, there are four motions that we have not had an opportunity to respond to. That would be the motion -- let's just see what the date of this is.

Motion to preclude witnesses for attorneys fees and for other sanctions, including dismissal

of the death penalty filed February 26th.

Motion to preclude evidence of late Sorenson Laboratory forensics testing filed --

THE COURT: 25th.

MR. BUTNER: -- I think the 25th. February 25th.

Motion to preclude the State's computer forensic experts and reports, filed February 25th.

And defendant's motion in limine to exclude evidence offered in violation of Arizona Rule of Evidence 403 and 404(B) filed on February 25th.

So we have not had an opportunity to respond to those four. The others, I think, we already have responded to.

THE COURT: Well, when do you think you can respond to -- and I have an oral argument request for the UBS, for the computer forensics, for the 404 and 403 motion, and for the February 26th motion to preclude witnesses for attorneys fees and other sanctions. I have oral argument requested in those. I have evidentiary hearing requested for the 403, 404(B) matters.

I am fast running out of time to do anything. I have, on the 17th, two trials that are set. One for 12 days, currently. I don't think it's going to take that long. Probably nine days.

I have another trial also starting on the 17th, supposedly lasting four to six days. Both of those are toward the tail end of their Rule 8 time.

I am seeking help from other judges. Have a settlement conference being conducted on the shorter of the two cases by Judge Ainley, today, in the Verde Valley.

But the other case, I don't think it's going to plead and go away. I think that goes to trial on the 17th, and it's probably going to last someplace in between seven and nine days. It's scheduled for twelve. They tell me it is not going to take that long, but there is some doubt.

MS. CHAPMAN: Your Honor, from our perspective, when we file these motions, as you can tell from the pleadings, almost the day we get the disclosure -- because from our perspective, the sooner that we have a ruling on these issues, obviously the better, and the prejudice that we outline in the motion increases on a daily basis from our perspective. So the sooner the better.

THE COURT: Do you really need oral argument on it?

MS. CHAPMAN: I think we do. And I think we do need an evidentiary hearing with respect to the 403 and 404(B). You heard some of the argument with respect to some of the motions, but we do get this new disclosure on a daily

basis, so I think -- especially with respect to some of the particular issues that State raises in response, I think you probably do need to hear from them, appears to be some factual disputes about dates and issues of prejudice, so --

MR. BUTNER: The responses, I believe, are due on the 8th, Judge, and we will get them filed by then.

THE COURT: By Monday?

MR. BUTNER: Yes.

MS. CHAPMAN: Your Honor, we'd ask that it be expedited sooner than that, given the date that the disclosures are being made and the time frame that we have available at this point. We did get more disclosure today, and we got more disclosure yesterday.

MR. BUTNER: And we will continue to disclose as quickly as possible, Judge. That is our obligation.

THE COURT: Well, I guess I would like to hear from both sides in particular, since I still have it under advisement about what happened with regard to this -- in particular, the shoe issue.

The information that the State had, apparently, in October, that the prints may have been made by a La Sportiva brand shoe and why that wasn't disclosed when it was received.

MR. BUTNER: Judge, it is my understanding

that Detective McDormett was in contact with the FBI during that time frame. We didn't even know if we had very good photographs. Those were submitted.

As to whether the photographs were sufficient to make any identifications, he got back a report. I believe the report was received in November. And basically, the report indicated that it appeared as if there was a type of shoe -- a La Sportiva type of shoe that may be similar to the prints that were photographed.

And these were photographs taken by evidence tech Don Miller, that were the subject -- that are going to be the subject of the Willits instruction in this case, and also some additional photographs taken by Theresa Kennedy. They were similar in nature. Detective McDormett was trying to figure out what that was about. He asked a volunteer to go through credit card receipts and so forth belonging to the defendant.

THE COURT: Why wasn't it disclosed when it was received?

MR. BUTNER: Judge, I really don't know. I was not aware of that report at that time. I don't think Detective McDormett --

THE COURT: Detective McDormett is your agent.

MR. BUTNER: I understand that, Judge, and I am not saying he isn't.

Detective McDormett received that report. He was not aware of whether that report was of any significance or not. And you look at a relatively short time frame, in terms of evaluating that kind of evidence, whether it is inculpatory, exculpatory, or what. It wasn't known as to what that evidence was -- if it even rose to the level of being worthwhile evidence.

Ultimately, in January, of course, he found out that the defendant had purchased some shoes of the La Sportiva type, so to speak.

THE COURT: Speaking of offers of proof, do you know at this point if the expert -- if he is allowed to testify on this issue -- would be able to testify that the prints made were by a La Sportiva brand shoe of the size that was ordered and/or delivered? Do you have connections, in other words, between the print and anything more than it's that type of shoe, as distinguished from the guy that sold the shoe, delivered the shoe, whether it was to the defendant or to some agent of his or simply put it in the mail? What is the evidence in connection with that?

MR. BUTNER: As I understand the evidence, Judge, it would be that the prints were made by a shoe similar, okay? We can't say match. We don't know that for certain. But a shoe of a similar tread pattern to the La Sportiva shoe. That's the only --

THE COURT: The precise shoe that was ordered, or that type of --

MR. BUTNER: There are several La Sportiva shoes that have that type of tread pattern, as I understand it. I think there are three different names for them -- Pike's Peak, and I don't remember the other two names.

The prints were made by a shoe similar to those types of shoes. They are in a common size. The expert can't say exactly what size, because the photographs and the prints in the dirt out there are not of sufficient quality to tell precisely what size, but of a common men's size between a size 9 and size 11. And the defendant ordered shoes in that size range.

THE COURT: Do you know precisely which size he ordered?

MR. BUTNER: Yes. Ten-and-a-half, I believe. Actually, I think it is a centimeter measurement, because of the European sizing, and I can't recall exactly what that size is at this moment in time. But he ordered them from a friendly acquaintance of his that had this online business in Boulder, Colorado, and those shoes were sent to the defendant by that business.

THE COURT: What appears or what is suggested by the defense motion is that you didn't disclose it until you found out that there was some degree of connection

between a general type of shoe with the shoeprint that was out there and could connect it up to Mr. DeMocker.

MR. BUTNER: Judge, I think that that is true in this case, but that doesn't mean that that evidence would not be disclosed whether it was connected to Mr. DeMocker or not connected to Mr. DeMocker. Ultimately, that evidence was going to have to be disclosed.

THE COURT: With regard to that particular issue, 15.7 applicability, what is the prejudice, if you can discuss that, with the disclosure at the time that it is disclosed?

MR. SEARS: Let's take a little look at the history of this issue. In April 2009, we have learned through disclosure, the police attempted to get the FBI to provide them assistance in identifying these same shoeprint impressions and were told, basically, that the FBI didn't have much in the way of help. Some very grainy, almost illegible faxes were sent in and disclosed to us of possible kinds of shoes which, by the way, to us look nothing like hiking or running shoes. They look like -- I was going to say clodhoppers, but that kind of dates me. But they are certainly not anything like the shoes here.

And so we proceeded to litigate through the Fall and into the hearings of January of this year our strong belief, based on the disclosure, that the State had no

evidence to support the idea that any of the shoeprint impressions that they were able to preserve in any way were associated with any shoe seized from Mr. DeMocker's home. And you remember the testimony and the evidence and the arguments and the drawing of diagrams here in your court and the resulting orders that you entered regarding that evidence, and I remember very clearly the State's response, that as a result of all of that, that they were now unsure about who may have been out on the open land behind the Bridle Path residence, making a -- we thought that matter had been put to rest and resolved and was done in the middle of January of this year.

Now, unbeknownst to us, until January 29 of this year, just more than a month ago now, the State was continuing to ask the same question of the FBI, hoping they would get a different answer. And to a certain extent, apparently, they did.

So in October and November, Detective McDormett, working on this issue, sends a group of photographs, many of which were rejected, apparently, by the FBI, to a criminalist, whose identity was unknown to us until January 29 of 2010, to see what would happen.

Here is another historical fact --

THE COURT: And that is Gilkerson?

MR. SEARS: Yes. Eric Gilkerson. He's an FBI

criminalist based at the lab in Quantico, Virginia, about whom we have been given very little information.

But here is another historical fact. At the time of the initial searches on July 3rd, 2008, of Mr. DeMocker's residence, a pair of La Sportiva shoes were seized from Mr. DeMocker. The State knew from the first day of this investigation that Mr. DeMocker owned a pair of La Sportiva shoes. We have pictures of them. I have put my hands on them. I have seen them. There are photographs of them in place at his residence, and the State knew that fact.

The State has had Mr. DeMocker's credit card bills nearly the same length of time. They began immediately to subpoena Mr. DeMocker's bank records and his credit card bills. Going through them is a tiresome task, and we will talk more about how tiresome it is to go through thousands and thousands of pages of documents, particularly if you don't know what you are looking for.

But it is disingenuous, at best, for the State today to suggest that somehow connecting the dots to Mr. DeMocker and these shoes through those credit card records was something that they had the right to delay until January of 2010, when they had that information. It is not our fault that the State does not know the discovery in their own case. It is not our fault that the State does not know what evidence they have and they don't have.

We knew that they had a pair of La Sportiva shoes that belonged to Mr. DeMocker, because we got the disclosure from them.

THE COURT: But the La Sportiva shoes that made the prints -- didn't the State already compare those shoes that they had, including the La Sportiva, with the precise prints that were made out there?

MR. SEARS: You have your apple and you have your orange, here, Your Honor. Mr. DeMocker apparently ordered more than one pair of La Sportiva shoes. I think the State concedes, as they must, that the La Sportiva shoes that they seized could not and did not have anything to do with the shoe impressions that they saw out in the open land.

But it certainly was a way for them to think about the possibility that maybe Mr. DeMocker, having purchased one kind of La Sportiva shoe, may well have purchased others. We sat here in this courtroom in January of this year and argued the shoeprint evidence thoroughly and completely and said, based on what we understood at the time, that the State had no evidence, would not produce any evidence, did not produce any evidence to contradict what we were telling you about the shoeprint situation and what that meant.

Now, had the -- the position that the State is taking is astonishing. The State is saying, I

think, that their obligation under Rule 15 and under Brady is to understand and think about and evaluate and interpret the evidence, before they decide it is discoverable and must be disclosed to us. I think you are on the right track, Your Honor, by suggesting that they had an affirmative obligation to disclose that FBI evidence, whether they ran to ground after the fact or not, to us at the time, because it would have impacted in October and November of last year how we investigated the case and how we pursue that issue.

Instead, because the State disclosed this, we have had to step back, pry the lid off the coffin, so to speak, of the shoeprint evidence, and start all over again and look at the photographs and look at the photographs they sent the FBI. We are going to have to go to Quantico, Virginia and interview this criminalist, unless something is done to put a stop to this now and understand what has happened, because the State is trying to claw its way back into this issue under these circumstances.

Had they disclosed those reports in October and November of 2009, and revealed the fact that they were still trying to do something about identifying the shoeprint information, then things would be different, but that is not what they do. And it is wrong for the State -- I would suggest it is more than just disingenuous -- it is wrong for the State to stand here in court and say that they

were doing the best they could, and they were just disclosing things as they became known.

One other critical fact that seems to have slipped off the screen here. The shoes, which I think are the Pike's Peak model, La Sportiva shoe that the State says credit card evidence and testimony from witnesses at La Sportiva say Mr. DeMocker ordered, were ordered in 2006, and have never been recovered.

But here is our great fear. If the State is permitted to do this, they will just add these 2006 shoes to the burn bag, that Mr. Ainley created for you, with the jumpsuit and the gloves and the golf club and all the other things that they are going to say that Mr. DeMocker used in this horrible murder and disposed of. And that's what's happened here. And they have not stopped. And Mr. Butner will say, as he has said before, that they are just going to continue to investigate things.

There is a stunning statement in their papers on this point, where they say they will continue to investigate unsolved matters in this case. That is a pretty powerful statement from the State, that two months before trial, parts of the State's case are unsolved.

This is precisely the kind of situation, Your Honor, that has caused me to stand up here several times now and say that our promises to be ready to go to

trial on May 4th are predicated on our belief that the evidence has to be fixed at some point in time and cannot be this kind of moving target, under these circumstances. It is one thing for the State to say that they have a continuing obligation to investigate the case and to evaluate new evidence.

It is another thing for the State, through its own inattentiveness and its own carelessness and its own lack of diligence to delay that, pull it out on January 29, 2010, and say "We just found this out. We just learned about this." That is improper. It changes everything in this case. It changes the way in which we look at the case. It changes the way in which the law of this chase is established, is going to be enforced, and it lets us know -- because we have seen this in other evidence -- it lets us know that the State will not stop. That we can litigate things, we can resolve things, we can put them away and move to something else, and the State, without telling us, will be out there trying to find a way to get out from under a bad ruling in this case.

I have tried to be diplomatic. I have tried to be patient. I have tried to be even-handed in this case. I have tried to acknowledge the difficult nature of this case.

But on this particular matter -- on the

matter of the way in which this shoeprint impression evidence has come to light and what the State is trying to do and what they want to do, I can't be still anymore. I have seen how this played out, and if it is not shut down now, there will be no end to this, and Mr. DeMocker will be faced with the impossible position of having to go to trial unprepared in this case or ask for a delay while he sits in jail as an innocent man. I can't tolerate either of those circumstances, Your Honor. We need to stop this now.

THE COURT: You recognize that sanctions of exclusion of witnesses are not favored.

MR. SEARS: Your Honor, I understand all of that, and I understand striking the death penalty is an extreme remedy. And we have not raised these points lightly.

We began last May predicting -- based on what we were seeing from the State at that point -- that there would come a day that the State's unwillingness to accept deadlines and abide by orders of the Court and abide by the Rules of Criminal Procedure would cause a problem. We're there. This is that day. It has been this day, now, for several weeks, but more than ever it is that day.

The fact that the State now thinks this is finally evidence that, for the first time in a very long time, is something that they would be proud to point to is not -- not the deciding issue in this case. What is

important in this case is how this happened and how we got here and why this can't be tolerated at this point.

If the Court were to reconsider releasing Mr. DeMocker today and extending the time for trial a reasonable amount of time, that is possible. But the position that the State's conduct has put us in at this very moment is something very different, and we have at every turn tried to understand what they were doing and tried to appreciate what they were doing, and we just can't. We just can't anymore.

And I am forever mindful of the Court's reluctance to jump to overblown or hyperbolic or exaggerated arguments, and I have tried my best, through the course of this case, to refrain from doing that. But today -- today is different, in my mind. This is this worst example of a course of conduct that we have been pointing out to the Court -- or trying to point out to the Court, as politely as we can now, for about ten months.

And it has come home to roost. And this parade of new exhibits and new documents and ten boxes, Your Honor, of files. This is the UBS disclosure. It is ten banker's boxes -- 14,000 e-mails. All of these things -- all of these things are coming together in a way that has put unbearable pressure on us and even more unbearable pressure on Mr. DeMocker to do something.

THE COURT: Well, I am not -- you filed the UBS and other motions, and that is still pending. I will set it for argument and have the State's responses to that.

Mr. Butner, you have another comment?

MR. BUTNER: I do, Judge. First of all, Judge, if you look at this case, we have DNA under the victim's fingernails that belonged to somebody else. We haven't stopped investigating that. We are continuing to do that.

In fact, that is what the evidence is that went to the Sorenson Lab, some of that. And we will continue to submit that kind of evidence to the Sorenson Lab or whatever lab we have to, to get things analyzed. We are continuing to investigate things -- questions in this case that are not answered. The State has an obligation to do that.

In regard to the La Sportiva shoes, Mr. Sears is correct. The defendant had a pair of La Sportiva shoes that didn't have anything to do with those kinds of tracks out there in the land out behind the victim's house. So are we supposed to somehow know that he had a second pair of La Sportiva shoes that may have been very similar in nature to those tracks? Of course not. You can't reach out into the ether, so to speak, and come up with things like that. You talk about hyperbole and overreaching

arguments, it is ridiculous to suggest that somehow the State should have known that the defendant had another pair of La Sportiva shoes.

THE COURT: Well, when you get an identification or a probable identification from the FBI agent or lab personnel, it seems to me you don't sit on that, either. But whether it is connected to or not connected to the State's ability to show that this defendant or somebody else purchased the particular shoe, I think it is subject to disclosure.

MR. BUTNER: Of course it is subject to disclosure, and it wasn't sat on. You got a report from an FBI criminalist that says "They may be similar in nature."

THE COURT: It wasn't disclosed either.

MR. BUTNER: No, that report wasn't disclosed until January, but it wasn't recognized that it had any real meaning either. We have La Sportiva shoes that didn't match. Okay? He looks at this report -- the detective -- and he says, "Well, I don't quite get what this refers to. We are going to look through thousands and thousands and thousands of credit card receipts." And the State comes up with something in a month or so, and that is supposed to reflect badly on the State for investigating? I don't think so, Judge.

THE COURT: Well, I guess my concern is you

are not the only side investigating the case. You've asked for the death penalty -- the office has. You are the representative of the office.

MR. BUTNER: Certainly.

THE COURT: And the other side is investigating the case just as hard, just as strongly as your side is. I think when you get the information that is pertinent that could be Brady material, if their -- what they had been able to connect up to a particular person through their investigation to somebody other than Mr. DeMocker. You are preventing them by your failure to disclose it from conducting their investigation.

MR. BUTNER: I understand that, Judge, and that may be true. Except the length of delay in disclosure was about two months. Not longer. About two months. And quite frankly, it takes a little while just to figure out what the evidence means.

Was it disclosed? Certainly it was disclosed. Would it have been? Certainly it would have been, just like everything else in this case.

We keep disclosing things, and we get that thrown back at us. Why do you keep disclosing? Why don't you just stop? Like there is something wrong with that.

THE COURT: Well, part of it is in terms of

timing, and I guess that's still an issue that I need to decide. Things that were known and things that were in possession of the State or your agents -- not necessarily you and the County Attorney's Office personally, but the reference is made to statements allegedly made by Mr. DeMocker that were recorded from the jailhouse that were not disclosed until much later than when they were identified. So those -- there are issues --

MR. BUTNER: It's the same kind of problem. You know, we have people that are volunteers, because there certainly isn't enough paid staff to do this kind of thing, that are going through all those statements. And there will be another disclosure relatively shortly of the latest batch of statements, so to speak, also, with a synopsis as to what the State believes statements -- which statements are important, of significance, so to speak. We have that obligation. We are doing that.

There has got to be some sort of understanding here that people have to expend time and effort and energy to accomplish these things. That isn't being inattentive. That isn't lack of diligence.

In fact, it is just the opposite. It is paying attention. It is going through evidence. It is going through credit card and bank records that are voluminous in nature, and then disclosing the things that we find to be of

significance.

We've already, Judge, disclosed the giant batches of these things. We just have taken some time to go through those things to figure out what they mean. It isn't like the defense didn't have these credit card receipts. They did. They had them the same as we did. And in fact, obviously, Mr. DeMocker is the guy who is making these purchases. He probably knows more about them than we do.

So in terms of prejudice, there is not prejudice demonstrated here, Your Honor. If anything, the prejudice has been to the State.

MR. SEARS: Your Honor, I have one additional piece of information that I think might help focus this discussion. It is in one of our motions.

At Bates 017816, we were given an FBI lab report that was sent to Brian Fagan of the FBI in Arizona. The report is dated October 22, 2009. It says the date that -- the date the specimens were received is October 2009.

So to be clear, the State possessed, and now has evidently disclosed to us, information that showed that the FBI was analyzing and reporting the results of their analysis more than three months -- not two months -- more than three months before that information was made known to us. And the communication that triggered this between the State, in this same Bates page disclosure, was dated

September 23, 2009, four months and a few days before it was disclosed to us.

So the State was possessed of this. They say what's the prejudice? I think these dates speak for themselves, Your Honor.

Giving it to us the end of January as opposed to giving it to us in September or October of 2009 makes all the difference in the world, particularly because we plowed ahead as if there was no such investigation going on, as if nothing had been done. That is where the prejudice is. We litigated -- successfully, we think, that issues, based on what we knew -- when the State had in its possession for months before those January arguments were conducted, information that would have played on it.

The Court is absolutely right. It could have been and it may still be Brady. We don't know whose shoes made those impressions. But the problem is we're now compelled, unless something happens, to try and figure this out and try to and respond to this, and we know what the State would say.

MR. BUTNER: Judge, you know it certainly makes a lot more sense if there is some sort of delay that is occasioned for the defense as a result of this delay in disclosure -- it certainly makes more sense to modify release conditions than to exclude evidence in this case. The

exclusion of this type of evidence is -- it would not be the kind of measure that is in keeping with an appropriate sanction for this.

There was no bad faith on the part of the State in this particular situation. There was on-going diligence in investigating this stuff. And to make a decision of a Draconian nature to exclude this evidence, just isn't appropriate under these circumstances.

THE COURT: I will direct the State to file its response to the other motions filed by Monday the 8th.

The question is -- and maybe you have the capabilities of answering this or not -- the defense motion concerning the 403, 404(B) evidence seemed to require some type of evidentiary hearing.

MR. BUTNER: Absolutely, Judge. This is a situation where the defense has assumed that certain types of evidence are going to be offered by the State in regard particularly to witness Barbara O'non. We recently were able to conduct an in-depth interview of Miss O'non, and we are not absolutely certain as to the evidence that will be elicited from Ms. O'non in regard to bad acts and so forth or other act evidence, if you will. The State recognizes that an appropriate type of hearing under Rule 404(B) would be necessary before any such evidence would be proffered, so to speak.

THE COURT: You are not disavowing that there may be a need for such a hearing?

MR. BUTNER: I am not disavowing that. No, Your Honor. I just think that probably what is suggested in the defense motion is beyond what would be offered by the State.

THE COURT: Okay. When do you think you are going to know? Not until Monday?

MR. BUTNER: Well, Judge, right. We will be responding to their motion and basically setting forth the kind of evidence that would be seeking to offer from Barbara O'non.

THE COURT: Could I have you address that by Friday on that particular motion?

MR. BUTNER: We could do that. Yes, sir.

THE COURT: Because I will need to put some decisions about where I am going to put hearings --

MR. BUTNER: I understand.

THE COURT: -- if you are not conceding the point or disavowing an intention to use, potentially, other acts that that motion speaks of.

What else did you want to do today with regard to the --

MS. CHAPMAN: Well, Your Honor, we have -- I think with respect to the Echols issue and the motion to

preclude the UBS evidence, the State has responded to those issues in their supplemental motion, and they also agreed to be prepared to offer proffer with respect to 25 or 26 witnesses. So with the time we have remaining today, I think we could take up either the proffers or, if Your Honor wants to proceed, we would really like to get the issue of this UBS information resolved, because it's a tremendous problem for the defense.

THE COURT: Mr. Butner, are you prepared, as far as the offers are concerned, or the Echols or UBS evidence, to respond to those two items?

MR. BUTNER: Yes.

THE COURT: Okay. Let's take up the -- what do you want first?

MS. CHAPMAN: Let's take up the UBS information first, Your Honor.

THE COURT: This is the late disclosed UBS evidence. It's a defense motion, so Miss Chapman.

MS. CHAPMAN: Your Honor, we received, on February 18, approximately 23,000 pages of disclosure from UBS. It constituted about ten banker's boxes of documents. And Your Honor, I took a photograph of it, so that Your Honor could see the volume of what we are talking about in terms of the disclosure.

This is in addition to at least another

thousand pages of disclosure that was made in the month of February alone and, Your Honor, it wasn't subpoenaed from UBS by the State until December of 2009. It wasn't disclosed until February 18th of this year, Your Honor.

And Your Honor has already ruled that evidence about relationships between Mr. DeMocker and his clients or evidence about client complaints or other client information from UBS is not relevant and won't be admissible. And we think it should be excluded on that basis alone. There is absolutely no reason for disclosure of this evidence to be made to the defense, given that Your Honor has found that it is not relevant.

And in addition to that basis, Your Honor, there is absolutely no way for the defense to -- in the amount of time remaining between now and trial, to review 23,000 pages of documents and e-mails that have been disclosed, with this amount of time.

Your Honor advised the State in May that it had an obligation to investigate its case. And subpoenaing e-mails from UBS in December over a year after the investigation began doesn't comply with that obligation. And we think this information should be excluded on that basis, as well as on the basis that it is just not relevant, given the Court's prior rulings.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, in regard to the UBS evidence, basically, this came about as a result of the State continuing to investigate the BlackBerry, and we kept encountering, basically, people saying that you can't go any further with the BlackBerry, that if you try again, it will be locked permanently, so to speak, and you won't be able to get anything out of the BlackBerry.

Finally, we got through to the proper people at UBS that indicated that, well, the BlackBerry was a captive type of BlackBerry, for lack of a better way for me to describe it, as I understand it. And that means that all of the BlackBerry stuff went through the UBS main server back in New Jersey. And if we were to subpoena what was on the main server in New Jersey, we would be able to get what was on the BlackBerry -- the problem being, though, that because the BlackBerry was hooked up to the defendant's business computer, you got everything that was on the defendant's business computer, as well as what was on the BlackBerry.

We asked for and specified that we just wanted the -- basically, not the business communications, but rather, the private communications on the BlackBerry. UBS said, "We don't want to go through all of that. Basically, we screen this stuff and will screen this stuff for confidential communications with clients and proprietary material, et cetera, but we are just going to give you

everything. They promised to give it much sooner than they finally did give it. We stayed after them repeatedly and finally got them to disclose it. Actually, I think they overnighted it, and it came out on Saturday, February 13.

There are approximately 6600 e-mails that we believe are significant, between the defendant and Barbara O'non and between the defendant and Carol Kennedy. And those are being gone through and have almost been completed by a detective in the sheriff's office. And as soon as that is done, that will be disclosed to the defense.

All I can say is, Judge, any delay that occurred on that was not as a result of inattention or lack of diligence by the State but, rather, was just -- we encountered a brick wall and kept pounding away at it until we finally found a way through it or over it or around it or however you wish to characterize it. And that is what led to the disclosure of this material from UBS.

We don't want to use any kinds of e-mails between Mr. DeMocker and his clients. We only want to use e-mails between Mr. DeMocker and Carol Kennedy, and Mr. DeMocker and Barb O'non, and that is reflective of, basically, Mr. DeMocker's financial circumstances and motive in this case.

So that is our explanation for it. I think we, in essence set for that explanation in our written

response.

THE COURT: So you've disclosed 23,000 pages, but your intention is not to use anywhere near that, but you haven't identified which pages you are intending to use.

MR. BUTNER: I believe that, Judge, by the end of this week, we will be able to tell the defense what we plan on using. But, as I told them -- and they already know this. This was disclosed to them in an interview the other day by Detective Huante, who is the detective going through these e-mails -- that is all we ever asked for, quite frankly.

And so we are not planning on using all of that other stuff. We're certainly not planning on presenting evidence about Mr. DeMocker and his relations with his clients, et cetera. It is between Barb O'non and Mr. DeMocker, and between Carol Kennedy and Mr. DeMocker.

THE COURT: What is Miss O'non's relevance to the case, what happened to Ms. Kennedy?

MR. BUTNER: Her relevance is that, basically, at almost exactly the same time that the defendant was going through his dissolution of his marriage, he was going through his dissolution of his business relationship with Barb O'non. And as a result of both of those dissolutions, he was under tremendous financial pressure.

He also was going through a dissolution

of his personal relationship with Barb O'non at the same time he was going through his dissolution of his personal relationship with Carol Kennedy. And so he was under tremendous emotional pressure at that time, also. All of that leads to motive in this case in the homicide.

MS. CHAPMAN: Your Honor, if I might. I have the subpoena that was issued to UBS, and it doesn't specify which e-mails. It asks for any and all e-mails to or from Mr. DeMocker. So it's not looking for specific or personal e-mails. It is asking for all e-mails to and from Mr. DeMocker.

So I don't know where the limitation came from or when it arose, but 23,000 pages were disclosed to us and now we have an obligation -- if any of those e-mails are going to be permitted to be used, we have a obligation to use all of them. That is what was disclosed to us, and that is what our obligation is, unless you prohibit their use.

There is no reason offered in any of Mr. Butner's explanation for why that subpoena couldn't have been issued before December, whenever he hit the brick wall that he refers to, that he couldn't have asked for what he asked for in December and any earlier time, when he had the obligation to investigate the case that he had the obligation from the time he began investigating the case in July -- over a year ago. There is no reason that that investigation

shouldn't have and couldn't have begun then, and there is no reason why -- they were only searching for 6,000 e-mails -- that they couldn't have requested those e-mails then or gone through the 23,000 e-mails that they received, had they requested them earlier and just produced those e-mails to us then, so that we could properly review them in advance of trial.

But that is not what happened. And now we're not in a position to do what we are required to do, and that is because the State has continued to not meet its obligation to investigate the case in a timely way and to disclose to us the materials it receives in a timely way. And that is what's happened again here.

The O'non information is not relevant. And if this had been disclosed in a timely way, that could have been part of the discussion that we were having about Miss O'non. But again, the State is telling us again today "We're not sure which information we're going to use about Miss O'non. We had an interview with her three weeks ago. We are not sure what information we are going to present from her. We can't tell you that, sitting here today with less than three months to trial. Which also leads to the e-mail issue, which we can't talk about because we haven't had time to review the 23,000 pages of e-mails which they just disclosed to us.

So all of these issues put us in an impossible position of having to respond to evidence with the confrontation right that we have, that the government and the State keeps violating by their continual late disclosure. And for that reason, they should not be permitted to rely on any of this disclosure, and we think it all ought to be excluded. And independent of whether they segregate out the 6600 e-mails, we have an obligation to review all of what is disclosed if they're permitted to rely on any of it, and we'd ask you to exclude all of it for those reasons.

THE COURT: Mr. Butner, you had something else?

MR. BUTNER: Judge, the subpoena was prepared after consultation with Anthony Raccuglia. We were told repeatedly that we could not get those kinds of e-mails. It was only after consultation -- not with counsel for UBS for many months, Mr. Henzy, because he never gave us that kind of information.

But once Mr. Henzy left the case, then we were able to talk with Mr. Raccuglia back in New Jersey. He ultimately told us about this captive e-mail situation with the BlackBerry.

So quite frankly, we didn't understand that we could even get these e-mails until very recently, and that was when the subpoena was issued, and that subpoena was

prepared in connection with the consultation with Mr. Raccuglia. I told Mr. Raccuglia what we needed and we didn't want all these other e-mails, but he said we should send the subpoena in the manner in which it was prepared, and so we did.

THE COURT: In general, it seems to me that the UBS evidence is not particularly relevant to the issues at hand in the case. To the extent that it is enlightening on motivation, I think that the explanation that I have been given is not demonstrative of due diligence in discovering the evidence. This evidence has been in existence since the -- prior to the arrest of the defendant. And the subpoena wasn't issued for it until -- nor apparently the right questions asked until very late in the preparation of the subpoena, late '09.

Once it was received, I think it has been disclosed. But still, it's not in a position where it can be identified as far as what is or what isn't going to be used. I haven't been presented with any information of what specifically is going to be used that is demonstrative of motive on the part of Mr. DeMocker, vis-a-vis Miss O'non or vis-a-vis Miss Kennedy.

My concerns -- and this seems to be as ignored by the defense as the obligation to make the discovery is ignored by the State's agents -- under 15.7, my

obligations are to select an appropriate sanction for non-compliance with the rules of discovery and select them in a way that least affects the merits of the case, according to the case law. I guess I can't imagine what would have occurred, as far as the investigation is concerned, if an earlier trial date had been selected.

I am going to, in general, preclude the UBS evidence. If you have some specifics in terms of particular e-mails that you believe are critical to the case, I will hear from the State at the time of the evidentiary hearing with regard to other acts, and I will consider whether I should lift the general band that I am ordering be implemented with regard to the UBS evidence. I don't think that the State acted with due diligence in connection with these materials.

The Echols motion. Ms. Chapman.

MS. CHAPMAN: Your Honor, I think the latest, with respect to Mr. Echols, was that Your Honor had ordered -- the initial order was for the State to disclose a list of materials that Mr. Echols relied upon in November. Then on January 22nd, Your Honor ordered that it be disclosed by the end of the week. And then I think another order was issued that it be disclosed on January 29.

On January 29, we received, by e-mail, a notification that the 46th Supplemental Disclosure was being

hand-delivered to Mr. Sears's office on February 1st, and also to Big Picture Video. On February 1st, when we received the disclosure, there was no Bates label log on the video.

On February 5th, we filed a motion with the Court notifying the Court that we had not received the 15.1 disclosure with respect to Mr. Echols.

On February 19th, we argued that motion to the Court and advised the Court that we hadn't received that disclosure. The State, yesterday, in its motion, advised that it had not heard that or was not aware of that until the argument on February 19. Frankly, I am not sure how the State was unaware of its failure to disclose that to the defense, given the motions that were filed and given its failure to put the log with the 46th Supplemental Disclosure.

But in any case, the disclosure was not made on January 19th. And it has now been made, but it was made past disclosure that was set by this Court. And given the issues with Mr. Echols's testimony, frankly, his failure to stay within the bounds of his expertise and the State's failure to make that disclosure in a timely way, we have asked Your Honor to preclude his testimony.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, first of all, let's bear in mind that all of the materials upon which Mr. Echols relied were disclosed. They were disclosed early on before

he ever took the witness stand.

Secondly, they were, in essence, redisclosed while he was on the witness stand. He was questioned repeatedly about what materials he relied upon, and he testified about that and, in fact, showed those items to the defense, a number of which were evidence items in that particular hearing.

True, the State made a mistake in terms of not getting the Bates labels on the last disclosure of Mr. Echols's materials, which were to be made on or about January 29. That was a -- in essence, it was a computer error, and we were unaware that the disclosure went out without the Bates labels -- the Bates log attached for those specific numbers. When we found out about it, we rectified it as quickly as possible.

I don't think that excluding Mr. Echols's testimony is an appropriate sanction, given the fact that, basically, there has been no prejudice in this case as a result of that. All of the disclosure has been made on an ongoing basis. It was a major mistake by the State in not getting those Bates numbers on that. That mistake has been corrected. They are in possession of everything upon which Mr. Echols relied and always have been. They just wanted us to be more specific in telling them by way of Bates number what that was. And I realize that we made a big mistake in

not getting that to them in a timely fashion. It can't be undone, so to speak, but the delay was not significant. It was very short, and we corrected is as quickly as possible.

THE COURT: Ms. Chapman.

MS. CHAPMAN: Your Honor, you know what? I would just like to add a few things. One, it's not just that we would like them to be more specific. The rule requires them to list what documents their experts rely on. It is not just with respect to Mr. Echols, but with respect to every expert they failed to make the proper disclosure.

Your Honor specifically advised the State that making a list by disclosure by category was insufficient. The State has disclosed a massive quantity of disclosure in this case, and they listed things like e-mails to a certain individual, and they would list a number of names. That did not provide the defense with the notice that's required under 15.1, nor did it comply with your orders, which you made several, to make the disclosure.

So after repeated orders and after failure to comply with 15.1 and after being advised that listing categories of documents was not in compliance, it's insufficient to say "Well, we just simply made another mistake." A series of failures to comply with the rule and with the orders with respect to multiple experts is not sufficient to comport with what we are required to do for

notice and to prepare our own experts.

With respect to prejudice, it is not acceptable for us to have to sort through the thousands -- hundreds of thousands of pages of disclosure with respect to financial records in this case, to figure out what Mr. Echols relied on, particularly when many of his opinions have nothing to do, frankly, with the financial records that were disclosed and have to do with things having nothing to do with financial opinions, which were the subject of other motions.

And in order to prepare our experts properly and, frankly, to prepare for an interview of Mr. Echols, which we have been unable to do in this case, and given that his testimony relates to very serious allegations of motive and the aggravators in this case, I think the prejudice is obvious. We are less than three months away. We haven't been able to interview him. We haven't been able to prepare for an interview with him. We haven't been able to properly prepare and confront the opinions that were prepared in his report or to prepare and confront his opinions through preparation of our own expert. That's the prejudice, and that's sufficient, and the repeated failures to comply give us sufficient cause to preclude his testimony, and that's specifically given the context of the kind of testimony he's previously offered and his failure to limit

his testimony to his areas of expertise.

THE COURT: Well, I have considered State v. Meza, M-E-Z-A, and Roque, R-O-Q-U-E, and I don't believe that it is appropriate to preclude the testimony based on several days' delay in getting the material, ultimately, that was given.

So I will deny the motion to preclude Mr. Echols, for those reasons.

What else are you capable of -- actually, we are five to 12:00 -- what are you capable of discussing in the remaining time?

MR. SEARS: Thank you. Back to the jury issue, Your Honor.

My recollection of our conversations with Margaret some months ago about this was that her lead time was something on the order of about three weeks to prepare the appropriate lists and sorts and send out summons to get the jurors in to answer the questionnaires. Backing that time period out from our suggested start date for that process on March 29, puts us probably at the end of this week or beginning of next week to do that, which I think requires an order saying that those will be the dates.

And in addition, for our own purposes, and I think probably for the State's purposes, having a questionnaire approved and adopted by the Court within a

short period of time, as reasonably possible. So I would like to go back to that, because I am afraid that if we wait until next week or later to take this matter up again, we will not have sufficient time for the jury commissioner to do her work to get people in to answer the questions on the questionnaire, whether it is the 29th or some other date.

THE COURT: Mr. Butner or Mr. Papoure, any particular comment on those things?

MR. BUTNER: Judge, you know my trial schedule isn't as bad as yours, but it's not real good, either, and I am in trial that week in March, starting -- I believe it's March 24th and going into that week. And so I am going to be in trial during that time frame. We've got Mr. Papoure aboard now, and certainly that's going to help. But to keep moving it back just wreaks havoc for me.

THE COURT: In terms of the actual filling out of the questionnaires, I don't believe that you were likely intending to be involved in that --

MR. BUTNER: Well, that's for sure.

THE COURT: -- that's going to be conducted by the jury commissioner. Have the people come in, pass out the materials, and have them fill it out.

And then do you have any basic objections with the defense running with the ball and copying those materials?

MR. BUTNER: Well, we can't do it. And I guess, you know, it's -- certainly we appreciate them picking up the load in that regard. If they've got some sort of a high-speed scanner and all of that, that is something that is just not possible in our outfit.

THE COURT: Did you take a look at the proposed admonition? Do you get a copy of the proposed admonition?

MR. BUTNER: I did. I think it is this one talking about -- basically, it is talking about MySpace and Twitter and BlackBerry and --

THE COURT: iPhones and --

MR. BUTNER: -- iPhones and all of that. And I am in full agreement with that kind of an admonition. I think I told Mr. Sears that, too. We need that sort of an admonition in this case or we are going to have real issues maybe even right in the middle of the trial.

THE COURT: So, Mr. Sears, what you proposed here was that the item that you wanted me to put on camera, essentially, and have that played for the members of the jury panels, respectively, as they show up?

MR. SEARS: I would like to do it in two places, Your Honor. I would like to have you include that in the video. But also, put it into the questionnaire itself.

There is a place in the questionnaire

where there is a more traditional statement about do not do any research. I was thinking that we could just fold this additional more expansive language right in there. And in the video, you can say "I want to call your attention particularly to this."

THE COURT: The part that was at the front of the --

MR. SEARS: Yes. The first page, I think. That would be our proposal.

And Your Honor, I am not clear. I got a little bit lost in where we are on the question of the shoeprint -- the newly disclosed shoeprint evidence. Is that matter now under advisement?

THE COURT: Well, it plays into what I have under advisement already. That was part of the motions that were filed last week that the State wanted a chance to respond to no later than Monday. Obviously, I would take any response that comes out before that.

But to the extent that I authorized them to file a response, no, it is not under advisement yet. No, I am not ruling on that today.

MR. SEARS: As Ms. Chapman said earlier, every day that goes by on these matters multiplies the prejudice to us of having to continue it --

THE COURT: I understand.

MR. SEARS: -- to treat this matter as if it might somehow be allowed to be used in this case.

And I know that you have the big ring calendar there. Are you looking at another date?

THE COURT: I am. I guess I'm not certain, as far as how much time may be necessary for the 403, 404 matter.

MR. SEARS: But since we don't know what, if anything, the State is going to bring up as 404(B), I defer to them. We can tell you how much time we think we need.

THE COURT: Any idea on that?

MR. BUTNER: Not at this point, Judge. No, quite frankly.

MR. SEARS: I think we probably need 90 minutes of the Court's time, at most, for what we think is already at issue and needs to be put on.

THE COURT: Have Robin come in, please.

(Brief pause in proceedings.)

THE COURT: Take a look, if you would, please, at three o'clock on the 30th.

MR. SEARS: Sorry?

THE COURT: Three o'clock on the 30th.

MR. BUTNER: Judge, that is a good day for me.

MR. SEARS: Your Honor, we can make the time work, and I understand the problems with time in this case,

but there is an awful lot of material to talk about in these motions and need for guidance and ruling from the Court, and that puts us, then, roughly five weeks before trial. And as we said, our continuing obligation to investigate and disclose, all of these things that we feel strongly are irrelevant have already been ruled out of bounds by the Court in other proceedings, just puts us in an even worse position then we are today. I don't know how else to put that.

And we still don't have -- if that is the next available Court date and we've ran out of time today, we still don't have the proffers from the State of these 25 or 27 witnesses, so we're really in a quandary about what to do. These are witnesses on the State's list that we think don't belong there, and we've tried to suggest to the Court and to the State why they are there, and we just don't know what to do. And we've had some assurances --

THE COURT: You have a list and he has a list of those that are of concern to you?

MR. SEARS: Yeah. It is in our -- it's a plea, Your Honor, actually. It's --

MR. BUTNER: Well, Judge, before he goes to his pleading -- when I stood up in Court and said that I would be ready to make a proffer about that today -- which, by the way, the Court didn't order, but the State volunteered, not as suggested by Mr. Sears -- I went and

ahead and got that material ready, and I can go ahead and submit that to writing to the defense certainly by the end of the week -- in the next couple of days or so. And then I would be happy to hear from Mr. Sears, if he wants to call me or he wants to e-mail me or something like that, if he wants some more information about that. He can let me know.

And apparently, they have added some witnesses that I am not aware of, so they are in a motion someplace. And if he can tell me who those people are, I'll see if I can proffer them, too.

THE COURT: Can you get that done -- today is Tuesday, can you get that done by Thursday?

MR. BUTNER: Sure.

THE COURT: Is that acceptable to -- at least it's in writing?

MR. SEARS: The problem is I am afraid that, once again, we are probably going to wind up no better than agreeing to disagree with the State. I mean, my great hope is that the State takes yet another hard look at their witness list and decides that some of these people could never have anything admissible or relevant to say at trial, and maybe that is what part of the proffer is.

But if they don't, we are going to go into next week with 25 or 27 people that, if the State intends to call them, we're obligated to investigate and

interview those people. And we're now two months and a couple of days out from trial. And we have been encouraging the State and asking the State -- and the Court has been encouraging and asking the State for months now to go through this process. Even today we are able to agree with the State that three witnesses, that were on their list that we scheduled interviews for this week, now no longer need to be interviewed.

MR. BUTNER: That's really going out of bounds. Let me tell you what that was about. That was about the back-country search team. We thought they wanted to interview everybody in the back-country search team, Judge, so we scheduled interviews for them of everybody.

Mr. Sears said, "You are not going to call everybody, are you?"

I said, "No, we don't need to call everybody, I just thought you wanted to interview everybody."

That's a perfect example of the discovery argument that goes on in this case, Judge. We disclose everything, and they say "Oh, you're too late, and that's the too much." And then they come back with that kind of a thing.

THE COURT: Mr. Sears.

MR. SEARS: The back-country people were the subject of a motion. The back-country search was done on

July 6, 2008. The identity of the people was not disclosed until recently. The identity of the people was disclosed because those people showed up on a witness list.

Our presumption was, and maybe now we need to fully set an interview to get some commitment from the State in advance or at least people, so that there's no confusion.

We don't want to interview a person on their witness list that they don't intend to call. I have far better things to do with my time as we've gone through this trial. That is what happened here. There is no disingenuity here on our part.

These people were late disclosed. The State indicated they wanted to talk about it. In fact, it was reactive, because if you remember the January hearings, we made the point that the State failed to conduct any meaningful search of that open property, and the State's reactive response, as they have been doing lately, was to say, "Oh, yes, we did. Here is this back-country search, and here are the people, and here are their names now."

And we have gone through and pulled out their names, and they're now witnesses, and they're going to come forward. Well, we do interviews of the police officers who conducted and discover -- they searched a relatively small area and found nothing. And so we suggested to the

State, before today -- we asked by e-mail two days ago -- "Do you really intend to call these people? Do they need to be interviewed?"

That's what this is about. This is no game that we're playing. We have no interest in doing that.

THE COURT: I'll order the County Attorney's Office to provide the offer as relates to the individuals identified in the particular motion.

And if there are several others, Ms. Chapman, could you give them to Mr. Butner at this point?

MS. CHAPMAN: I can.

MR. SEARS: We will do that before we leave here today, Your Honor.

THE COURT: All right. I will include those in the offer. If you would please give them to Mr. Butner, so that we can make sure that he covers everybody that he needs to.

My recollection is you were rather taken up the rest of the week, Mr. Butner, with other trials or matters?

MR. BUTNER: That's correct, Judge.

THE COURT: Let me see what I can do to find some additional time.

At this point, I will plan on the 404, 403 hearing for the 30th of March. I am going to have to

vacate somebody else's hearing. And let me put you at 2:30, as early as I can start it.

Stand in recess.

(Whereupon, these proceedings were concluded.)

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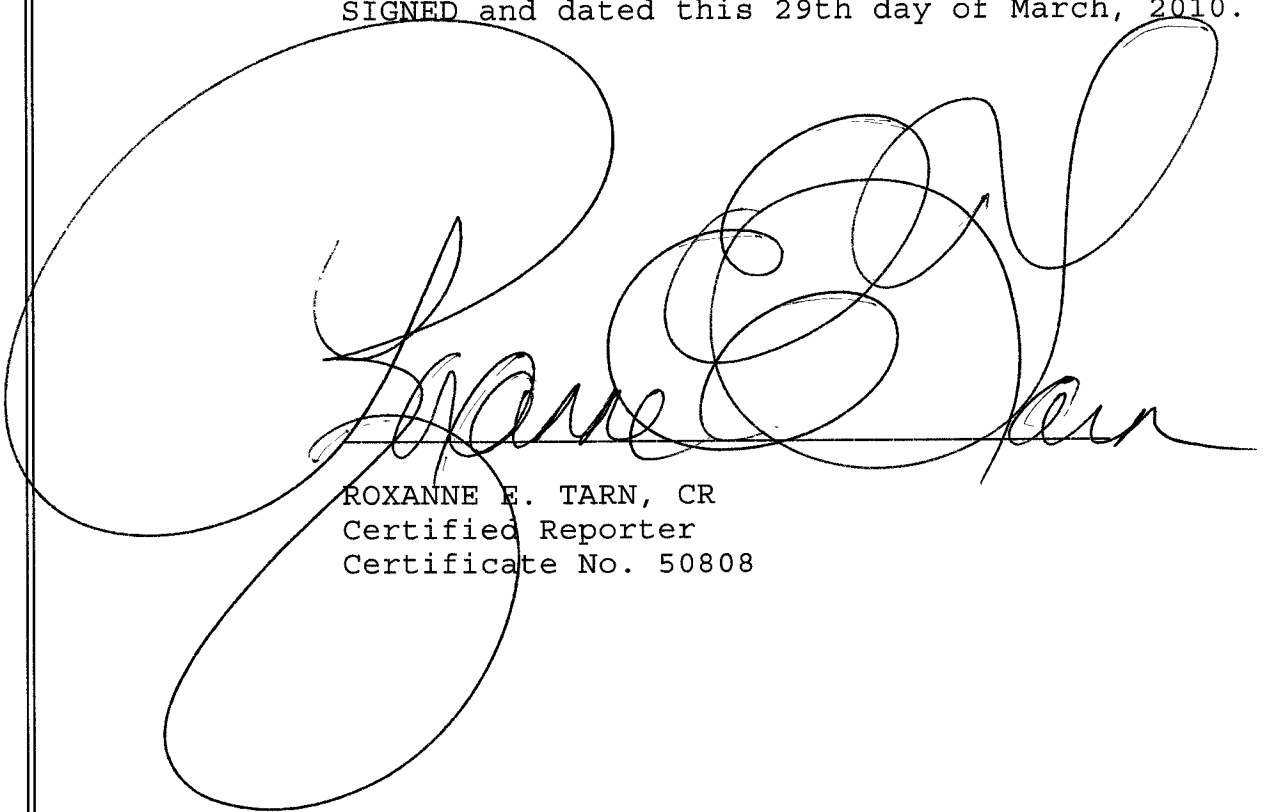
C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages 1 - 99 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 29th day of March, 2010.



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